

## **APPENDIX**

**APPENDIX****TABLE OF CONTENTS**

Appendix A	Opinion in the United States Court of Appeals for the Fourth Circuit (August 15, 2023) . . . . .	App. 1
Appendix B	Order Granting Defendant's Motion [81] for Summary Judgment in the United States District Court for the Northern District of West Virginia (October 27, 2022) . . . . .	App. 4
Appendix C	Judgment in a Civil Action in the United States District Court for the Northern District of West Virginia (October 27, 2022) . . . . .	App. 18
Appendix D	Order Denying Petition for Panel Rehearing and Rehearing <i>En Banc</i> in the United States Court of Appeals for the Fourth Circuit (October 13, 2023) . . . . .	App. 20

---

**APPENDIX A**

---

**UNPUBLISHED**

**UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

**No. 22-2136**

**[Filed August 15, 2023]**

---

MITAL SUMAN KUMAR PATEL, Dr.,	)
Plaintiff – Appellee,	)
	)
v.	)
	)
DENIS R. MCDONOUGH, Secretary	)
United States Department of Veterans Affairs,	)
Defendant – Appellant.	)
	)

---

Appeal from the United States District Court for the Northern District of West Virginia, at Clarksburg. James P. Mazzone, Magistrate Judge. (1:21-cv-00131-JPM)

Submitted: April 26, 2023      Decided: August 15, 2023

Before KING and QUATTLEBAUM, Circuit Judges, and FLOYD, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

## App. 2

**ON BRIEF:** Nicholas Woodfield, R. Scott Oswald, THE EMPLOYMENT LAW GROUP, PC, Washington, D.C.; Drew M. Capuder, CAPUDER FANTASIA, PLLC, Fairmont, West Virginia, for Appellant. Jordan V. Palmer, Assistant United States Attorney, Morgan S. McKee, Assistant United States Attorney, Christopher J. Prezioso, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Wheeling, West Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Dr. Mital Suman Kumar Patel appeals the district court's order granting summary judgment to Denis McDonough on his claims for national origin discrimination in violation of Title VII of the Civil Rights Act of 1964. Patel alleged two bases for violations of Title VII: (1) disparate treatment based on national origin and (2) disparate impact based on national origin.

As to Patel's disparate treatment claim, we have reviewed the record and find no reversible error. In reviewing the record on Patel's disparate impact claim, we similarly find no reversible error. However, we note that the district court granted summary judgment for Patel's disparate impact claim on two separate bases. First, it held that a plaintiff in a disparate impact case is required to put forth expert statistical evidence and, because Patel did not do so, his claim failed. But we do not require statistical evidence, let alone expert statistical evidence, to prove a disparate impact claim.

### App. 3

*Thomas v. Washington Cnty. Sch. Bd.*, 915 F.2d 922, 926 (4th Cir. 1990) (“[A]lthough disparate impact cases usually focus on statistics, they are neither the exclusive nor a necessary means of proof.”). However, we affirm on the alternative basis that, considering the evidence put forth by Patel as a whole, he has failed to set forth a *prima facie* case of disparate impact discrimination.

We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

***AFFIRMED***

---

## APPENDIX B

---

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT  
OF WEST VIRGINIA  
CLARKSBURG**

**CIVIL ACTION NO.: 1:21CV131 (BAILEY)**

**[Filed October 27, 2022]**

---

MITAL PATEL,	)
Plaintiff,	)
	)
v.	)
	)
DENIS MCDONOUGH, Secretary of the U.S.	)
DEPARTMENT OF VETERANS AFFAIRS,	)
Defendant.	)
	)

---

**ORDER GRANTING DEFENDANT'S MOTION  
[81] FOR SUMMARY JUDGMENT**

Currently pending before the Court is Defendant's Motion [81] for Summary Judgment.<sup>1</sup> The matter has been fully briefed. Oral Argument would not significantly aid the decisional process. Accordingly, the Court's decision is set forth below.

---

<sup>1</sup> This matter was referred to the undersigned to conduct all proceedings and order the entry of a final judgment in accordance with 28 U.S.C. 636(c) and Fed. R. Civ. P. 73. See ECF No. 50.

**I.**  
**FACTUAL/PROCEDURAL HISTORY**

**A. General Statement of Facts**

Plaintiff brought this action under Title VII of the Civil Rights Act of 1964, as amended. More specifically, this matter arises out of Plaintiff's attempt to secure employment with the Clarksburg Louis A. Johnson Veterans Affairs Medical Center ("the Clarksburg VAMC") in 2015. Plaintiff claims that he was disparately treated based on his national origin when he was not hired as a physician at the Clarksburg VAMC. Plaintiff further claims that the hospital's policy that its physicians either be Board Certified or have conducted a residency at a facility/program accredited by the Accreditation Council for Graduate Medical Education ("ACGME") resulted in disparate treatment of all physicians who completed their medical residency outside of the United States, and thus disparately impacted people on the basis of their national origin. Plaintiff filed his initial Complaint on August 27, 2020, in the United States District Court for the District of New Mexico. ECF No. 1. Plaintiff filed an Amended Complaint on September 21, 2020. ECF No. 7. This matter was transferred from New Mexico on September 23, 2021. ECF No. 35.

Prior to filing the instant action, Plaintiff filed a formal complaint of discrimination against Defendant with the United States Equal Employment Opportunity Commission ("EEOC"). This matter proceeded in the normal course through the administrative process. The Administrative Law Judge

## App. 6

decided the matter in Defendant's favor in a decision rendered March 31, 2020. ECF No. 81-3.

On August 10, 2022, and pursuant to the Scheduling Order entered April 5, 2022, [ECF No. 66], Defendant filed its Motion for Summary Judgment and Memorandum in Support. ECF No. 81. Plaintiff filed a Memorandum in Opposition on August 31, 2022. ECF No. 82. Defendant filed a Reply in Support on September 14, 2022. ECF No. 83.

### **B. Statement of Undisputed Facts**

The following facts are undisputed in the record:

- Jurisdiction is proper (ECF No. 7, p. 1; ECF No. 57, p. 1);
- Plaintiff exhausted his administrative remedies prior to instituting this suit (ECF No. 7, p. 1; ECF No. 57, p. 1);
- Plaintiff was born in India (ECF No. 81-1, p. 3; ECF No. 82, p. 1);
- Plaintiff attended medical school at Baroda Medical College in Vadodara, India and completed his orthopedic surgery residency at Baroda Medical College in Vadodara, India (ECF Nos. 81-1, p. 3; ECF No. 82, p. 1; ECF No. 7, p. 3 ECF No. 57, p.2);
- Following the completion of his residency, Plaintiff received certification from the Educational Commission for Foreign Medical Graduates (“ECFMG”) (ECF No. 7, p. 3; ECF No. 57, p. 2);

## App. 7

- Plaintiff applied for the position of Physician (Orthopedic Surgeon), Vacancy ID 1339775, Announcement Number T38-15-09-CSB-1339775-BU, at the Clarksburg VAMC (ECF No. 7, p. 3; ECF No. 57, p. 3);
- At the time of Plaintiff's application to the Clarksburg VAMC, it was the policy of the VA to require the following (as applicable to this case) before granting clinical privileges to practice orthopedic surgery (and thus, to be hired): (1) current certification or active participation in the examination process leading to certification in orthopedic surgery by the American Board of Orthopedic Surgery, or (2) successful completion of an ACGME or AOA accredited post graduate training program in orthopedic surgery (ECF No. 7, p. 4; ECF No. 81-1, p. 4);
- To obtain board certification in orthopedic surgery, one must complete 60 months of accredited residency, no more of 6 months of which can be obtained in a residency program outside of the United States (ECF No. 7, p. 4; ECF No. 81-1, p. 5);
- At the time of his application, Plaintiff was not Board Certified in Orthopedic Surgery (ECF No. 81-1, p. 4-5; ECF No. 82-6, p. 8; ECF No. 82-8, p. 3-4);
- At the time of his application, Plaintiff had not completed an ACOME accredited post-graduate training program in orthopedic surgery (ECF

## App. 8

No. 7, p. 13; ECF No. 57, p. 2; ECF No. 81-1, p. 4-5; ECF No. 82-3, p. 3; ECF No. 82-6, p. 8);

- At the time of his application, Plaintiff had completed a one-year fellowship with Lenox Hill Hospital in New York City in Adult Hip Orthopedic Reconstruction, which was accredited by the ACGME (ECF No. 7, p. 3; ECF No. 81-1, p. 3; ECF No. 82-4, p. 2);
- According to Defendant, Plaintiff did not meet the credentialing requirements because he had not completed an ACGME or AOA accredited post graduate program in orthopedic surgery (ECF No. 7, pgs. 4 and 14; ECF No. 81-1, p. 5);
- No exception could be made for Plaintiff's fellowship with Lenox Hill Hospital or any comparable training he might have received abroad (*Id.*; ECF No. 81-3, p. 6);
- Approximately one year after Plaintiff's application, Clarksburg VAMC changed its credentialing policy to widen its potential physician applicant pool (ECF No. 81-1, p. 6);
- Clarksburg VAMC offered Plaintiff a position as an orthopedic surgeon, but Plaintiff declined the offer (ECF No. 81-1, p. 6; ECF No. 81-3, p. 7);
- Plaintiff accepted a position with a hospital in New Mexico where he makes approximately \$555,000 per year (ECF No. 81-3, p. 7);
- Dr. Sambandan, an orthopedic doctor who was born in India and completed his medical

residency in India, was hired to fill the vacancy at issue (ECF No. 81-1, p. 6; ECF No. 81-4, p. 69).

**II.**  
**ARGUMENTS OF THE PARTIES**

**A. Defendant's Arguments**

Defendant argues that there are no genuine issues of material fact, and thus, summary judgment is appropriate. Defendant contends that Defendant has failed to make a *prima facie* case that he was disparately treated, and Defendant further contends that Plaintiff cannot support his claim of disparate impact because he does not have an expert to present at trial.

**B. Plaintiff's Arguments**

Plaintiff contends that genuine issues of material fact exist, which preclude summary judgment. In particular, Plaintiff contends that the issue of Defendant's motivation in failing to hire Plaintiff is a genuine issue of material fact which must be decided by a jury. Plaintiff further argues that Plaintiff does not need an expert to introduce statistics at trial to support his claim for disparate impact. Plaintiff argues that Defendant's Motion should be denied.

**III.**  
**APPLICABLE LAW**

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that

there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). In reviewing a motion for summary judgment, the court views the facts and inferences in the light most favorable to the non-moving party. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). “When a properly supported summary judgment motion is made, the adverse party must set forth specific facts showing that there is a genuine issue for trial.” *Id.* *See also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 250 (1986) (internal quotations omitted).

**IV.**  
**DISCUSSION**

After considering the arguments of the parties, the applicable law, and the Court file, the Court is satisfied that Defendant’s Motion for Summary Judgment should be **GRANTED** because no genuine issues of material fact exist for trial.

**A. Disparate Treatment**

Plaintiff has asserted a disparate treatment claim under Title VII of the Civil Rights Act, which makes it unlawful for an employer to “fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. 2000e-2(a)(1). Plaintiff claims that Defendant discriminated against him because of his national origin. *See* ECF No. 7.

“A plaintiff may establish a Title VII violation by direct evidence, circumstantial evidence, or some combination of the two.” *Robinson v. Volvo Group North America, LLC*, 65 F.Supp.3d 458, 461 (M.D.N.C. Nov. 4, 2014) citing *Moore v. City of Charlotte*, 754 F.2d 1100, 1105 (4<sup>th</sup> Cir. 1985) (discussing the ways discriminatory intent may be shown by direct or circumstantial evidence). The *Robinson* Court acknowledged that “[a]t times, the Fourth Circuit has suggested that direct or circumstantial evidence may establish discriminatory intent, separate and apart from the well-known *prima facie* case set forth in *McDonnell Douglas Corp. v. Green*<sup>2</sup>. . . . At other times, the court has suggested that circumstantial evidence is the heart of the *McDonnell Douglas* approach.” However, “[r]egardless of the method of proof used, the court has made it clear that ‘[t]he plaintiff always bears the ultimate burden of proving that the employer intentionally discriminated against [them].’” *Robinson v. Volvo Group North America, LLC*, 65 F.Supp.3d 458, 461 n. 2.

Here, there is no dispute that there is no direct evidence of discrimination. “Without direct evidence of intentional discrimination, a plaintiff may use the burden-shifting framework of *McDonnel Douglas Corp. v. Green* . . . to develop and inferential case of discriminatory intent.” *Lyons v. City of Alexandria*, 35 F.4<sup>th</sup> 285, 289 (4<sup>th</sup> Cir. 2022). Plaintiff has in fact chosen to use the burden-shifting framework of *McDonnel Douglas*. ECF No. 82. The Court will

---

<sup>2</sup> 411 U.S. 792, 802 (1973).

therefore consider the evidence and argument presented to the Court vis-à-vis this framework.

“The *McDonnell Douglas* framework has three steps. First, the plaintiff must establish a prima facie case of . . . discrimination. . . . Then, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse employment decision. Finally, the burden shifts back to the plaintiff to show that the employer’s proffered legitimate, nondiscriminatory reason is a pretext.” *Id.* (internal citations omitted). In the instant case, Defendant argues that Plaintiff has failed to make a prima facie case of discrimination.

To make a prima facie case of discrimination, a plaintiff must show that (1) the complainant belongs to a protected class; (2) that the complainant applied and was qualified for a job for which the employer was seeking applicants; (3) that, despite complainant’s qualifications, complainant was rejected; (4) under circumstances giving rise to an inference of discrimination, i.e., that, after the rejection, the position remained open, and the employer continued to seek applications from persons of complainant’s qualifications [outside the protected class]. *See McDonnell Douglas Corp*, 411 U.S. at 802. *See also McNaught v. Virginia Community College System*, 933 F.Supp.2d 804, 817-18 (E.D. Va. Mar. 20, 2013) (“[i]t is well-established that in order to satisfy [the fourth] prong in an ordinary discrimination case, a plaintiff only needs to show that the position was filled by an applicant outside of the plaintiff’s protected group”). Plaintiff claims that only the fourth element is in

dispute. *See* ECF No. 82, p. 14. Defendant, however, appears to contest the second element, as well. *See* ECF No. 81-1, p. 10 n. 6. Notwithstanding, the body of Defendant's Motion focuses primarily upon the fourth prong.<sup>3</sup> Thus, the Court will consider only the fourth element vis-à-vis Defendant's Motion for Summary Judgment. In so doing, the Court will construe the evidence in the light most favorable to Plaintiff and, for purposes of evaluating Defendant's Motion for Summary Judgment, will proceed with the assumption that Plaintiff was qualified for the position at issue.

Defendant argues that Plaintiff has failed to provide any evidence that Defendant's decision not to hire Plaintiff was made under circumstances which give rise to an inference of discrimination because Plaintiff has not provided any evidence to support a conclusion that prospective employees outside of Plaintiff's protected class were treated more favorably under similar circumstances. In response to Defendant's arguments, Plaintiff first argues that Defendant concluded Plaintiff's medical residency in India was not comparable to a residency in the United States. ECF No. 82-3; ECF No. 82-7, p. 35; and ECF No. 82-8. Plaintiff next argues that Defendant's expert, Ms. Enchelmayer, testified that Plaintiff's successful completion of an ACGME fellowship satisfied Clarksburg VAMC's Privileges Policy. Finally, Plaintiff points to the testimony of Drs. Cassim and Snider that they would have hired Plaintiff if he could have been

---

<sup>3</sup> Defendant's argument with respect to the second prong appears in footnote no. 6 of Defendant's brief in support of his Motion for Summary Judgment. See ECF No. 81-1, p. 10.

privileged at the hospital. However, these facts, even when viewed in the light most favorable to Plaintiff, do not give rise to an inference of discrimination because none of these facts, regardless of whether they are considered separately or together, show that Defendant continued to seek or accept applications from persons with Plaintiff's qualifications, but outside of the protected class (i.e. national origin).<sup>4</sup> See *McNaught*, 933 F.Supp.2d at 817-18. Indeed, there appears to be no evidence in the record that anyone outside of Plaintiff's class with similar qualification and/or in similar stead as Plaintiff vis-à-vis the vacancy at issue fared better than Plaintiff at any point during the evaluation process. Because Plaintiff has failed to demonstrate that he was refused employment under circumstances that give rise to an inference of discrimination, the Court must find that Plaintiff has failed to establish a *prima facie* case of disparate treatment discrimination under Title VII of the Civil Rights Act.

## **B. Disparate Impact**

Disparate impact claims under Title VII of the Civil Rights Act serve to ameliorate rules in the workplace and business practices that are "fair in form, but discriminatory in operation." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431(1971). To establish a *prima facie* case of disparate impact discrimination, a plaintiff must

---

<sup>4</sup> In fact, the opposite is true. Once Clarksburg VAMC's Privileges Policy was changed, and after Plaintiff rejected the offer for the position at issue, Clarksburg VAMC filled the vacancy with a physician, Dr. Sambandan, an orthopedic doctor who was born in India and who did his orthopedic residency in India.

demonstrate that (1) a facially neutral policy has a (2) disproportionately adverse impact upon a protected class, of which the plaintiff is a member. *Anderson v. Westinghouse Savannah River Co.*, 406 F.3d 248, 265 (4<sup>th</sup> Cir. 2005). Only the second element is in dispute here. “In establishing a *prima facie* violation of Title VII, a plaintiff may use statistical evidence.” *Id.*

To support his disparate impact claim, Plaintiff has offered statistical evidence. See ECF No. 82, pgs. 19-21. See also ECF No. 85. “Proof of disparate impact requires reliable and accurate statistical analysis performed by a qualified expert.” *EEOC v. Freeman*, 961 F.Supp.2d 783, 786 (D. Md. Aug. 9, 2013). More particularly, a plaintiff in a disparate impact case “bears the burden of supplying *reliable* expert testimony and statistical analysis that demonstrates disparate impact stemming from a *specific* employment practice before such a violation can be found.” *Id.* at 787 (emphasis in original). Here, Plaintiff has not designated an expert to explain and/or present these statistics and their import. See ECF No. 85. Without such expert evidence and/or testimony, Plaintiff cannot support a *prima facie* case for disparate impact discrimination. Plaintiff’s lack of an expert is therefore fatal to Plaintiff’s case.

Even if the Court could or would be inclined to consider the reports Plaintiff has offered in his Memorandum in Opposition (ECF No. 82), the Court would nevertheless conclude that Plaintiff has failed to make a *prima facie* case of disparate impact discrimination. To support such a claim, again, Plaintiff may rely upon statistical evidence. See

## App. 16

*Anderson*, 406 F.3d at 265. According to *EEOC v. Freeman*, 961 F.Supp.2d at 786-787, the evidence must demonstrate a disparate impact which stems from a *specific employment practice*. The employment practice Plaintiff highlights in the instant case is Clarksburg VAMC's (expired) requirement that physicians be board certified or have completed an ACGME accredited post graduate training program in orthopedic surgery. The statistical reports submitted by Plaintiff, however, do not relate to this specific employment practice. Rather, the reports, articles, and papers Plaintiff cites appear to discuss diversity in orthopedic surgery as a general matter, and the plight of international medical students vis-à-vis orthopedic residency programs. *See* ECF No. 82, pgs. 19-21. This is not a specific enough association to support a *prima facie* case for disparate impact discrimination. The case law requires evidence to support a finding that Defendant's specific business practice had a disparate impact upon a class of persons of non-U.S. national origin. *See Freeman*, 961 F.Supp.2d at 786-87 ("[m]erely pointing to 'statistical disparities in the employer's work force' is not sufficient; the plaintiff must provide 'statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs...because of their membership in a protected group'" (quoting *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 992 (1988)). Plaintiff therefore cannot make a *prima facie* case of disparate impact discrimination.

**V.**  
**CONCLUSION**

Accordingly, and for all of the foregoing reasons, Defendant's Motion [81] for Summary Judgment is **GRANTED**, and this case is hereby **DISMISSED WITH PREJUDICE**. The Court **DIRECTS** the Clerk to **STRIKE** this matter from the active docket of this Court and enter judgment in favor of Defendant.

It is so **ORDERED**.

The Court **DIRECTS** the Clerk of the Court to serve a copy of this Order upon any *pro se* party by certified mail, return receipt requested, and to counsel of record herein.

Date: 10-27-22

*/s/ James P. Mazzone*  
JAMES P. MAZZONE  
UNITED STATES MAGISTRATE JUDGE

---

## APPENDIX C

---

**UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF WEST VIRGINIA**

**Civil Action No. 1:21-CV-131**

**[Filed October 27, 2022]**

---

MITAL PATEL	)
<i>Plaintiff(s)</i>	)
	)
v.	)
	)
U.S. DEPARTMENT OF VETERANS AFFAIRS	)
<i>Defendant(s)</i>	)
	)

---

**JUDGMENT IN A CIVIL ACTION**

The court has ordered that:

Judgement award    Judgment costs    Other

other:   Defendant's Motion for Summary Judgment  
is GRANTED, and this case is hereby  
DISMISSED WITH PREJUDICE.

This action was:

tried by jury    tried by judge    decided by judge

decided by Judge James P. Mazzone

App. 19

Date: October 27, 2022    *CLERK OF COURT*  
Cheryl Dean Riley  
J. Barr  
*Signature of Clerk or  
Deputy Clerk*

---

**APPENDIX D**

---

**UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

**No. 22-2136  
(1:21-cv-00131-JPM)**

**[Filed October 13, 2023]**

---

MITAL SUMANKUMAR PATEL, Dr.	)
Plaintiff - Appellant	)
	)
v.	)
	)
DENIS R. McDONOUGH, Secretary	)
United States Department of Veterans Affairs	)
Defendant - Appellee	)
	)

---

**O R D E R**

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge King, Judge Quattlebaum, and Senior Judge Floyd.

For the Court  
/s/ Nwamaka Anowi, Clerk